

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 ALFRED W. TRENKLER )  
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 )

CRIMINAL NO. 92-10369-Z

DEFENDANT'S MOTION FOR LEAVE TO PRESENT TESTIMONY OF  
MAURICE R. FLYNN PURSUANT TO FED. R. EVID. 613(b)

Defendant, Alfred W. Trenkler, pursuant to Fed. R. Evid. 613(b), hereby moves for leave to present the testimony of Maurice R. Flynn to impeach Government witness Richard Brown by proof of a prior inconsistent statement. Brown testified on November 5, 1993, regarding a conversation in which Defendant allegedly informed Brown that he had drawn a diagram of a bomb for federal agents. Flynn is expected to testify that Brown, on a prior occasion, stated that he [Brown] was certain that he had in fact been present when Defendant drew the diagram.

Flynn's testimony is admissible under Rule 613(b). First, the prior statement by Brown about which Flynn is expected to testify is diametrically opposed to Brown's direct testimony. Second, the issue around which Brown's inconsistent statement is centered is of critical importance and may be the very cornerstone on which the jury determines Defendant's guilt or innocence. The allegation that Defendant drew a diagram of the 1991 device is the only direct evidence offered by the Government to date that Defendant made the 1991 bomb. Finally, Brown was

afforded an opportunity on cross-examination to explain the statement. Thus, Defendant should be afforded an opportunity to present evidence which squarely contradicts Brown's testimony regarding this key issue, and which seriously calls into question his credibility.

#### ARGUMENT

Fed. R. Evid. 613(b) provides, in pertinent part, that:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

The First circuit has held that where a witness's prior statement is inconsistent with even the "tenor" of his direct testimony, that statement is admissible for impeachment purposes under Rule 613(b). United States v. Hudson, 970 F.2d 948 (1st Cir. 1992) (testimony that witness had previously expressed the desire to see that Defendant "got what he deserved" was inconsistent with tenor of direct testimony that witness was free from bias, and thus admissible under 613(b)). Brown testified on direct examination that he had a conversation with Defendant in which Defendant told him that he had drawn a diagram of a bomb for the ATF agents, and that Defendant had shredded the diagram because the ATF agents did not take it with them. [Tr. 9-163]. Brown also testified that he was not "face to face" with Defendant when Defendant told him about the drawing incident. [Tr. 9-164].

Flynn will testify that on or about June 9, 1993, he was present during a conversation at defense counsel's office, in

which Brown stated that he had been present when Defendant drew the diagram for the ATF agents. Flynn will further testify that, when asked if he was certain that he had been present, Brown stated that he was certain that he had been. These prior statements by Brown are patently inconsistent with Brown's direct testimony as outlined above. At no point in his direct testimony did Brown claim to have been an eyewitness to the actual drawing of the diagram. To the contrary, Brown testified that he was informed by Defendant about the diagram, and that he was not face to face with the Defendant when he was told. As the *Hudson* court recognized, where prior statements, such as those made by Brown in the presence of Flynn, are inconsistent with the tenor of a witness's statements made during direct examination, those prior statements may be presented under Rule 613(b).

While the First Circuit does not explicitly require defense counsel to cross-examine the witness about the prior statement while on the witness stand, defense counsel nevertheless directly confronted Brown with his prior inconsistent statement during cross-examination. *Hudson*, 970 F.2d at 955 ("the foundation requirements of 613(b) do not require that the witness be confronted while on the witness stand). During cross-examination, Brown was explicitly interrogated as to the prior statement, and ultimately stated that he did not recall having said that he was certain he was present when Defendant drew the diagram. [Tr. 10-13]. Thus, the Rule 613(b) requirement that a witness be afforded an opportunity to explain or deny the prior statement has been expressly satisfied.


Finally, the issue around which Brown's prior inconsistent statement is centered is of critical importance in this proceeding and may become the very cornerstone upon which the jury determines Defendant's guilt or innocence. The Government has alleged that Defendant drew a diagram of the 1991 bomb which duplicated a unique, nonpublic component of that device. The alleged diagram is the only direct evidence that the Government has presented that Defendant is indeed the bombmaker. A failure to allow Defendant to present testimony through Flynn that seriously calls into question the credibility of a Government witness on such a key issue may indeed be prejudicial error.

#### CONCLUSION

For the reasons set forth above, Defendant requests leave to call Maurice Flynn as a witness.

Respectfully submitted,

For the Defendant,  
Alfred W. Trenkler,  
By his attorneys,



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DATED: November 9, 1993

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail BY HAND Nov. 9, 1993.



1 to somebody he just met.

2 Q At some point did you have a conversation with  
3 Mr. Trenkler with respect to Mr. Trenkler doing anything at  
4 the request of an ATF agent regarding a diagram?

5 MR. SEGAL: Object to the leading nature of that  
6 question.

7 THE COURT: He may have the question.

8 A He did draw a block diagram.

9 THE COURT: The question is did you have -- did you  
10 have a conversation with Mr. Trenkler about that, yes or no?

11 THE WITNESS: Yes.

12 Q What did you tell Mr. Trenkler and what did he tell you  
13 first about the nature of the diagram?

14 A It was a pretty quick thing just for the fact that he  
15 hadn't taken the diagram with him and had shredded it.

16 Q In the course of the conversation with Mr. Trenkler, what  
17 did you understand the diagram to represent?

18 MR. SEGAL: I object.

19 THE COURT: He may tell us anything Trenkler said  
20 about it, but his understanding about that is not relevant.

21 MR. LIBBY: I'll rephrase, your Honor.

22 Q What did Mr. Trenkler tell you that the diagram  
23 represented?

24 A I'm not exactly sure. It was a diagram of a bomb.

25 Q Beyond that Mr. Trenkler told you something else about

1 that diagram, did he say something about what happened to the  
2 diagram?

3 A As I said a couple of minutes ago, he had taken it and  
4 shredded it because ATF agents had taken it with him.

5 Q And would you tell us, please, Mr. Trenkler's demeanor as  
6 he told you that?

7 MR. SEGAL: Objection. I thought we were on the  
8 telephone. He was not in person but on the telephone.

9 THE COURT: If he was on the telephone, he couldn't  
10 tell us the demeanor.

11 Q Could you tell us Mr. Trenkler's demeanor when he told  
12 you?

13 A That I don't recall.

14 Q Were you face to face with him?

15 A No, I don't believe so.

16 Q Now, I believe you testified that you stopped dealing  
17 with Mr. Trenkler in roughly in the February '92 time frame?

18 A Yes.

19 Q Before you stopped having contact with Mr. Trenkler in  
20 February of 1992, do you recall a particular conversation with  
21 Mr. Trenkler with another person present at ARCOM's Broad  
22 Street offices?

23 A Yes.

24 Q And who was that third person, please?

25 A Donna Shea.

1 THE COURT REPORTER: I'm sorry. Who?

2 A Karolides. I don't know how to pronounce his last name.

3 Q If I suggested it's K A R O L I D E S, would that be  
4 about right?

5 A Yes.

6 Q You understood Mr. Karolides to be an investigator  
7 assisting me on the case?

8 A Yes.

9 Q And was there another fellow seated there who was a  
10 white-haired man?

11 A I know there was another individual there, I don't  
12 recall.

13 Q All right. Now, do you recall while you were in the  
14 office producing those records, you told us you had been  
15 present when ATF agents asked Al to draw a diagram of the  
16 bomb?

17 A Yes.

18 Q And do you recall telling us on that day that you saw Al  
19 draw a diagram of the bomb?

20 A No, I don't remember saying that, but I did see the  
21 diagram that he had drawn --

22 Q No, please, Mr. Brown. Stick with me. We're talking  
23 about the meeting in my office in June of this year when you  
24 came to produce the records. You recall that, right?

25 A Yes.

1 Q Do you recall saying at that meeting, you saw Al draw a  
2 diagram of the bomb? That's my only question. Do you recall  
3 saying that?

4 A No, I don't recall saying that.

5 Q Do you recall saying that you heard Al ask the ATF agents  
6 if he could keep the diagram?

7 A I don't remember saying that, no.

8 Q Do you recall saying at that meeting in my office that  
9 you were sure you had been present when Al drew the diagram  
10 for the ATF agents?

11 MR. LIBBY: Objection, your Honor, asked and answered  
12 twice.

13 THE COURT: He said you had asked him earlier whether  
14 he remembers being present.

15 Q And now the question is -- this is a little different.

16 Do you recall saying you were sure you were present  
17 when Al drew the diagram for the ATF agents?

18 THE COURT: He can have the question.

19 A I don't remember, no.

20 THE COURT: Members of the jury, let me caution you.  
21 When counsel asks the witness a question in the form of a  
22 statement and the witness doesn't accept the statement, that  
23 is not evidence of the truth of the statement. If I say to  
24 you, now you got up at 9 o'clock this morning, and you say no,  
25 that is not evidence of the fact that you got up at 9 o'clock